

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2881

Appeal MA13-175

Toronto Police Services Board

May 10, 2013

Summary: On February 28, 2013, the Toronto Police Services Board issued an interim decision and fee estimate to the requester, more than 30 days after receiving the request. The police are of the view that the interim decision and fee estimate was issued within the 30 day timeframe imposed by the *Municipal Freedom of Information and Protection of Privacy Act*, as they had to clarify the request prior to issuing a decision. The order states that neither the clarification request nor the interim decision and fee estimate were issued within the 30 day timeframe. As such, the police are found to be in a deemed refusal situation pursuant to section 22(4) of the *Act*, and are ordered to issue a final access decision within one week of the date of this order, without any further time extension.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 17, 19, and 22.

Orders and Investigation Reports Considered: Orders MO-1520-I, PO-2595 and PO-2634.

BACKGROUND:

[1] On January 25, 2013, the Toronto Police Services Board (the police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) dated January 24, 2013.

[2] The request was for access to the following records:

Badge #s/IDs/Names of all individuals who have accessed any and all databases related to me and the reasons for those accesses to my information.

[3] On February 7, 2013, the requester called the police for a status update regarding the request. The requester spoke with the assigned Analyst (the analyst) and she received no indication from the analyst that clarification was required. The wording of the request was not changed.

[4] On February 28, 2013, the requester called the police again since she had not received an access decision and it had been more than 30 days since she submitted the request. The requester indicates that she spoke with the Freedom of Information Coordinator (the coordinator) who confirmed that an access decision had not been issued. The requester further indicates that during this telephone call, she received no indication from the coordinator that the request required clarification and the wording of the request was not changed.

[5] In a letter to the requester dated February 28, 2013, the coordinator advised as follows:

Section 17(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) provides that:

"A person seeking access to a record shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record."

Please be advised that upon consultation with the Information Security Unit of the Toronto Police Service, we were asked to provide a timeframe for the information you wish to access (e.g. past five years) ... If I do not receive any correspondence from you regarding this matter by March 20, 2013, I will assume you no longer wish to pursue this request and process your file accordingly.

[6] The requester advised that the letter from the coordinator was postmarked March 5, 2013 and received by the requester the following day.

[7] The requester responded to the coordinator by letter dated March 6, 2013. She expressed concerns regarding the processing of the request to date and she provided the following timeframe: "the last 8 years started from January 1, 2005 to present date that the request is completed."

[8] On April 2, 2013, the requester received an interim decision and fee estimate from the coordinator that was dated March 27, 2013. The letter advised that the estimated cost for the production of the requested records from the machine readable records of the police is \$420.00. The letter continued as follows:

A decision on whether the records are subject to disclosure will be made upon receipt (of a 50% deposit) by this office ... For your edification, the retention period for the Internal Search Records is five years. If we do not hear from you by April 16, 2013, I will assume you are no longer interested in pursuing this request and close the file accordingly.

[9] On April 5, 2013, the requester (now the appellant) appealed the interim decision and fee estimate of the police. Appeal MA13-175 was opened.

[10] On April 11, 2013, a Notice of Inquiry was issued to both parties advising that the appellant had filed an appeal and that the police appeared to be in a "deemed refusal" situation since an access decision had not been issued within the time period set out in section 19 of the *Act*.

[11] The appeal was assigned to me to determine whether the interim decision and fee estimate dated March 27, 2013 had been issued within the timeframe mandated under the *Act*.

[12] On April 18, 2013, the coordinator wrote to the appellant to advise that the police had closed the request since the police had not received a fee deposit from the appellant. The appellant received this closing letter on April 24, 2013, and she immediately contacted the IPC expressing her concerns about the delay in processing the request and the apparent closure of the request by the police.

[13] On the same date, the IPC received a letter from the coordinator dated April 22, 2013. With reference to two enclosed letters, the police stated that they were not in a "deemed refusal position". Enclosed were the interim decision and fee estimate dated March 27, 2013 and the closing letter dated April 18, 2013.

[14] On April 25, 2013, the Registrar of the IPC advised the appellant and the police that the appeal was still open.

[15] On the same day, the Registrar received an e-mail from the coordinator. The coordinator explained why the police believed a clarification of the request was necessary and she requested an explanation of why the police were considered to be in a deemed refusal situation when an interim decision and fee estimate had been issued and no deposit had been received.

[16] The Registrar advised the police that it appeared that either a request for clarification or an access decision should have been issued on or before February 23, 2013, which is 30 days after the request was received as contemplated by section 19 of the *Act*. Since neither a request for clarification nor an access decision was issued within 30 days, the police appeared to be in a deemed refusal situation.

[17] Further to the Notice of Inquiry, the Registrar advised the police that the date for the issuance of a final decision would be extended to May 3, 2013, and that if a decision was not issued by May 3, 2013, I would be in a position to issue an order requiring the police to provide a final decision letter to the appellant.

[18] On April 30, 2013, I tried to call the analyst to confirm whether the police expected to issue the final decision by May 3, 2013. I did not receive a response to my voice mail message.

[19] On May 3, 2013, I received from the police a copy of an "Amended Decision Letter" that was dated May 1, 2013 and addressed to the appellant.

[20] The Amended Decision Letter stated:

Further to our correspondence dated April 18, 2013, partial access is granted to all Police Reports held by this Police Service under your name. The name, badge number and unit of the officer's [sic] involved are listed within the reports ... Further to your request and our letter dated March 27, 2013 ... this office has been informed that *it will take a total time of seven (7) hours for [a] member of the ISO to produce the record responsive to your request.* Therefore, the estimated cost is \$420.00. Please be advised that the extraction of information will only start upon receipt of your written acceptance of this fee, together with a deposit of \$210.00 (50% of the total amount). Additional preparation and photocopy fees may apply ... a decision on whether the records are subject to disclosure will only be made once we receive the extracted information ... For your edification, the retention period for the Internal Search Records is five years. If we do not hear from you by May 20, 2013, I will assumed you are no longer interested in pursuing this request and close the file accordingly ... [emphasis added]

[21] The records provided to the appellant with the Amended Decision Letter were entirely comprised of general occurrence reports and records, including some records that pre-date the boundaries of the five-year timeframe requested by the appellant. As stated in the Amended Decision Letter (see emphasis above), the record that would have been responsive to the appellant's request was not enclosed.

[22] I discussed the Amended Decision Letter and partial disclosure of records with the appellant, who confirmed that the disclosed records were not responsive to her request and that she wanted her appeal to proceed.

DISCUSSION:

[23] The issues raised by this appeal relate to sections 17, 19, and 22 of the *Act*.

[24] Section 17 states, in part:

17(1) A person seeking access to a record shall,

- (a) make a request in writing to the institution that the person believes has custody or control of the record;
- (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
- (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[25] Section 19 sets out the time for responding to the request as follows:

19. Where a person requests access to a record, the head of the institution to which the request is made or if the request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

[26] Section 22(4) sets out the parameters for a deemed refusal situation as follows:

22(4) A head who fails to give the notice required under section 19 or subsection 21(7) concerning a record shall be deemed to have given

notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[27] In order to determine whether the interim decision and fee estimate dated March 27, 2013 or the May 1, 2013 amended decision letter had been issued within the timeframe mandated under the *Act*, I must first determine whether the request for clarification was issued properly.

[28] Section 19 of the *Act* requires the police to issue a written notice to the requester with respect to access to the requested records within 30 days after the request was received, subject to sections 20, 21 and 45. If the police do not issue the written notice within this time frame, and none of the other sections apply, then the police would be in a deemed refusal situation pursuant to section 22(4) of the *Act*.

[29] The police acknowledge receiving the appellant's request on January 25, 2013. Therefore, according to section 19 of the *Act*, the police should have issued a written notice to the appellant on February 23, 2013. The police did not do so and, therefore, pursuant to section 22(4) of the *Act*, the police were in a deemed refusal as of February 23, 2013.

[30] Section 17(1)(b) of the *Act* requires the person making an access request to "provide sufficient detail to enable an experienced employee of the institution, upon a reasonably effort, to identify the record". If this is not the case then section 17(2) of the *Act* requires the police to inform the requester of the defect and offer assistance in reformulating the request so that it complies with the requirements in 17(1)(b).

[31] The letter from the police dated February 28, 2013, made reference to the requirements of section 17(1)(b) of the *Act* and asked the appellant to provide a time frame for the information that she wished to access. Without making a finding on the validity of the clarification request, I find that it was issued when the police were already in a deemed refusal.

[32] The Notice of Inquiry sent to the police indicated in part that:

Other orders have found that an interim decision/fee estimate should be issued within the initial 30 day time limit for responding to a request (Orders MO1520-I, PO-2634). Otherwise the institution would be in a "deemed refusal" pursuant to section 22(4) of the Act. Issuing an interim decision/fee estimate once the time limit has expired does not cure a deemed refusal (Orders PO-2595, PO-2634).

The institution should immediately issue a final decision letter to the appellant if it has not already done so, and forward a copy to the Analyst.

[33] To date, the police have not issued a final decision letter.

[34] In accordance with previous orders, I further find that the issuance of both the interim decision and fee estimate dated March 27, 2013 and the Amended Decision Letter dated May 1, 2013 did not cure this deemed refusal situation (Orders PO-2595, PO-2634).

[35] To ensure that there are no further delays in the processing of this request, I am ordering the police to complete the search for records that are responsive to the request and issue a final decision by May 17, 2013, without recourse to any time extensions.

ORDER:

1. I order the police to complete the search for records that are responsive to the request and issue a final access decision to the appellant regarding access to the records in accordance with the *Act*, without recourse to any further time extensions and no later than **Friday, May 17, 2013**.
2. In order to verify compliance with Provision 1 of this order, I order the police to provide me with a copy of the decision letter referred to in Provision 1 no later than **Friday, May 17, 2013**. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

Original signed by: _____
Jessica Leinwand
Analyst

_____ May 10, 2013